

REMARKS

This amendment is submitted in response to the final Office Action mailed on February 9, 2005. Claims 1-9 and 21-27 are pending in this application. In the Office Action, Claims 1-9 and 21-27 are rejected under 35 U.S.C. §112, first paragraph, Claims 1, 3-4 and 21-23 are rejected under 35 U.S.C. §102 and Claims 2, 5-7, 8-9 and 24-27 are rejected under 35 U.S.C. §103. In response Claim 23 has been amended. This amendment does not add new matter. In view of the amendments and/or for the response set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 1-9 and 21-27 are rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement. Regarding Claim 1, the Patent Office alleges that the phrase “substantially lacks rough edges and forming tool marks” is not described in the specification. In response, Applicants respectfully disagree with the Patent Office’s assertion. The specification, for example, teaches that the invention relates to a round item of frozen confectionery, preferably one obtained by extrusion-forming, that has an even roundness generated by revolution and essentially lacks an apex, rough edges and forming tool marks. See, specification, page 4, second paragraph. Substantially can be another term for essentially, and the specification clearly teaches that the round item of frozen confectionery can substantially or essentially lack rough edges and forming tool marks. *Id.* Further, Applicants submit that substantial or essential lack of an apex, rough edges and forming tool marks are separate and distinct characteristics describing an embodiment of the present invention. However, Claim 1 is directed to two of these characteristics – the rough edges and forming tool marks. The lack of an apex need not be claimed as it is a separate and distinct feature of an alternative embodiment. Accordingly, the as-filed specification reasonably conveys to one having ordinary skill in the art that Applicants had possession at that time of the claimed subject matter.

Regarding Claim 21, the Patent Office alleges that the confection “substantially lacks an apex” is not supported in the originally filed disclosure. As discussed previously, the term substantially can be another term for essentially, and the specification clearly teaches that the round item of frozen confectionery can substantially or essentially lack an apex. See, specification, page 4, second paragraph.

Regarding Claim 23, the Patent Office alleges that the term “substantially uncoated” is not supported by the original disclosure. In response, Claim 23 has been amended to remove the term “substantially.” This amendment is fully supported in the as-filed specification. Based on at least these noted reasons, Applicants believe that Claims 1-9 and 21-27 fully comply with 35 U.S.C. §112, first paragraph. Accordingly, Applicants respectfully request that the rejection of Claim 1-9 and 21-27 under 35 U.S.C. §112 be withdrawn.

In the Office Action, Claims 1, 4 and 21-22 are rejected under 35 U.S.C. §102(b) as anticipated by JP 01030541 to Miura (“*Miura*”). Claims 1, 3-4 and 21-23 are rejected under 35 U.S.C. §102(b) as anticipated by U.S. Patent No. 3,809,774 to Raitt (“*Raitt*”). Applicants respectfully disagree with and traverse these rejections for at least the reasons set forth below.

Independent Claim 1 recites, in part, a round item of frozen confectionery having an even roundness and a cohesion of greater than 95%, which substantially lacks rough edges and forming tool marks. Contrary to Claim 1, neither *Miura* nor *Raitt* disclose or suggest a round item of frozen confectionery having a cohesion of greater than 95% as required by the present claims.

Determining cohesion (i.e. measure of deformation) requires more than simply the height of the ice cream portion or frozen confectionery after being formed in a scoop. For example, the height of the portion just before hardening is also required. Nowhere does *Miura* and *Raitt* disclose or even suggest the size before hardening of the portion, and the Patent Office cannot assume that the ice cream portion hardens without deformation while still in the scoop in the cited references without providing evidence of same.

Further, *Miura* and *Raitt* do not disclose or suggest an ice cream portion with a high cohesion because the quality and shape of the portion made by molding will inherently have many imperfections due to the molding process. *Miura* and *Raitt* do not even suggest the need to provide a portion that can closely maintain its molded shape, which is beneficial with the high quality shape of embodiments of the present claims.

Miura and *Raitt* also fail to disclose or suggest a round item of frozen confectionery that substantially lacks rough edges and forming tool marks as required by Claim 1. *Miura* shows a core (1) arising from a semi-fluid extruded through a central nozzle. See, *Miura*, Abstract. However, this core has rough edges (17a and 17b) as shown in Figure 2 of *Miura*, which teaches

away from the present claims. Further, even with the placement of the chocolate coating, *Miura* discloses the addition of nut particles (16), which removes any smooth appearance of the ice cream thereby teaching away from the present claims of a round item of frozen confectionary that substantially lacks rough edges. *Raitt* teaches frozen confections that are attached to prongs (37) to enable the confections to be carried via strips. See, *Raitt*, Figure 5. Accordingly, these prongs inherently form protrusions on the surfaces of frozen confection that are observable when the strip is removed, which teaches away from the present claims of a round item of frozen confectionary that substantially lacks forming tool marks.

Miura and *Raitt* also fail to disclose or suggest extrusion forming at a temperature of -7 °C or less as required by Claim 3. For example, Applicants have found that extrusion-forming offers the surprising advantage of producing a frozen confectionary having an even roundness and lacking forming tool marks while the temperature of -7 °C or less facilitates the achievement of a cohesion of 95% or greater, which has a significant effect on maintaining the even roundness.

For the reasons discussed above, Applicants respectfully submit that Claim 1 and Claims 3-4 and 21-23 that depend from Claim 1 are novel, nonobvious and distinguishable from the cited reference.

Accordingly, Applicants respectfully request that the rejections of Claims 1, 3-4 and 21-23 under 35 U.S.C. §102(b) be withdrawn.

Claim 2 is rejected under 35 U.S.C. §103 as being unpatentable over *Miura* in view of U.S. Patent No. 1,993,130 to Ballew ("*Ballew*"). Claims 5-7 are rejected under 35 U.S.C. §103 as being unpatentable over *Miura* in view of U.S. Patent No. 6,025,003 to Jadraque et al. ("*Jadraque*"). Claims 8-9 and 24-27 are rejected under 35 U.S.C. §103 as being unpatentable over *Raitt* in view of GB 2139337A to Porterfield ("*Porterfield*"). Applicants respectfully submit that the patentability of Claim 1 as discussed previously renders moot the obviousness rejections of Claims 2, 5-7, 8-9 and 24-27. In this regard, the cited art fails to teach or suggest the elements of Claims 2, 5-7, 8-9 and 24-27 in combination with the novel elements of Claim 1.

Accordingly, Applicants respectfully request that the obviousness rejections with respect to Claims 2, 5-7, 8-9 and 24-27 be reconsidered and the rejections be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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Dated: May 9, 2005